

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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E.I. DUPONT DE NEMOURS & COMPANY )

Complainant )

v. )

NORFOLK SOUTHERN RAILWAY COMPANY )

Defendant )

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Docket No. NOR 42125

ENTERED  
Office of Proceedings

JUL 22 2011

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Public Record

**SECOND MOTION TO COMPEL  
OF E.I. DUPONT DE NEMOURS & COMPANY**

Pursuant to 49 C.F.R. §§ 1114.31(a) and 1117.1, Complainant, E.I. du Pont de Nemours and Company ("DuPont"), hereby petitions the Surface Transportation Board ("STB" or "Board") to compel Norfolk Southern Railway Company ("NS") to respond to those portions of DuPont's Requests for Production ("RFPs") 20, 21, and 22<sup>1</sup> that are not Sensitive Security Information ("SSI").<sup>2</sup> NS has refused to produce responsive records that it deems SSI unless it receives assurances from the Federal Railroad Administration ("FRA") and the Transportation Security Administration ("TSA") that such information either is not SSI or that production is not prohibited by regulation. Despite the diligent efforts of the Board to facilitate the process for obtaining these assurances, over 90 days have passed without any assurances as to whether or when FRA and TSA will act. As a consequence, DuPont already has been prejudiced by a delay in its case that has now extended beyond the close of discovery. In order to avoid further delay and prejudice, DuPont asks the Board to address this issue by ordering NS to respond to those portions of RFPs 20-22 that do not implicate SSI.

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<sup>1</sup> Exhibit A contains a copy of the RFPs and NS's objections.

<sup>2</sup> DuPont has posed other discovery requests dealing with information that NS deems SSI. NS has agreed to respond to the extent the requests do not seek SSI. This Motion does not encompass those discovery requests.

## **I. BACKGROUND**

DuPont RFPs 20-22 seek detailed records of all NS car and train movements in the SARR states. These data, which are housed in NS's waybill and car and train event files (collectively "traffic data"), contain information that is core to a stand-alone cost ("SAC") proceeding. Without that information, DuPont cannot begin to select the traffic that is essential to designing the stand-alone railroad ("SARR"), develop an operating plan, and calculate SARR revenues and operating and investment costs. Moreover, until DuPont has reviewed the traffic event data, it cannot complete discovery, such as selecting contracts and other pricing authorities for review. These records are absolutely essential to the development of DuPont's SAC case, which NS does not dispute.

Rather, NS has objected to producing its traffic data because it allegedly contains SSI. The supposed SSI is the actual routes over which NS has transported toxic inhalation hazard ("TIH") commodities. If NS is correct that this historical data is SSI, it would require the consent of FRA and TSA, pursuant to 49 C.F.R. 15.15(e) and 1520.15(e), to disclose the SSI.

Although DuPont did not agree that any portion of the traffic data is SSI, and noted that no other rail carrier defendant in a rate case has asserted such claims, DuPont agreed to jointly approach the Board with NS in an effort to resolve this matter to the satisfaction of all parties without resort to adversarial motions. Towards that end, DuPont, NS, and South Mississippi Electric Power Association (SMEPA)<sup>3</sup> met with the Board on March 8, 2011. The Board agreed to immediately contact FRA and TSA to address this issue.

Pursuant to the Board's request, NS formally presented its concerns to the Board in a March 9, 2011 letter. According to NS:

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<sup>3</sup> SMEPA is the complainant in Docket NOR 42128, *South Mississippi Electric Power Association v. Norfolk Southern Railway Company*, in which this same issue has arisen.

the traffic event files will show where NS routes TIH commodities and the stations, yards, rail lines, and trains that typically handle those highly dangerous commodities. As we discussed at the discovery conference yesterday, NS acknowledges that traffic data (including car event records) are essential to a SAC case, and NS is ready and willing to produce such traffic data. Before NS can do so, however, it requires an authoritative determination that production of such information will not violate obligations imposed by agencies charged with the protection of SSI.<sup>4</sup>

DuPont submitted a reply letter on March 10, 2011. Although DuPont did not agree with the NS conclusion that its traffic data contain SSI, DuPont did not object to a process by which the Board would consult with FRA and TSA to resolve this issue. But DuPont's agreement was predicated upon this process being expeditious:

DuPont also recognizes that an extended discovery dispute before the Board, and potentially other agencies and the courts is likely to result in a prolonged delay of this proceeding. Therefore, to the extent this issue can be addressed successfully and expeditiously by consultation of the Board with FRA and TSA, DuPont would welcome the Board's efforts.

But, DuPont asks that the Board not to [sic] allow this process to turn into a quagmire of additional proceedings before other agencies during which this rate case is left in a holding pattern. If a prompt resolution cannot be obtained, DuPont reserves all of its rights and remedies under the applicable statutes and regulations. Moreover, DuPont requests that the Board remain open to exercising its full authority to compel production of information that is essential to a rate case, and also to alternatives for the presentation of stand-alone cost evidence without the SSI at issue.<sup>5</sup>

At a meeting hosted by FRA on April 13, 2011, and attended by DuPont, SMEPA, NS, the Board, FRA and TSA, a satisfactory solution appeared to have been reached. That solution was for FRA, after consultation with TSA, to issue a formal decision, pursuant to 49 C.F.R. 15.15(e), that would permit NS to produce SSI traffic data under the "Highly Confidential"

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<sup>4</sup> Ex. B at 4. (Letter from Paul A. Hemmersbaugh, Counsel for NS, to Rachel D. Campbell (Mar. 9, 2011)).

<sup>5</sup> Ex. C. at 2 (Letter from Jeffrey O. Moreno, Counsel for DuPont, to Rachel D. Campbell (Mar. 10, 2011) (underline added)).

designation in the Board's Protective Order in this proceeding. At the time, FRA represented that this decision would be published within 1-2 weeks. After more than three months, no decision has been published and FRA has not indicated when, or even whether, any decision can be expected. This process has turned into the very "quagmire" that it was intended to avoid.

DuPont has no desire to place the Board in the awkward position of determining whether the traffic data contains SSI, or potentially ordering the production of information that is SSI. Nor is it absolutely clear whether, and to what extent, the Board might have such authority. Such questions would lead to an even greater "quagmire" as these issues likely would ultimately have to be resolved by an appellate court. Therefore, in this motion, DuPont asks the Board to order NS to produce its traffic data, but without the alleged SSI information, so that DuPont can proceed to develop its SAC evidence using alternative sources for the missing "SSI" data.

## **II. ARGUMENT**

### **A. The Legal Standard for Motions to Compel.**

The Board will grant motions to compel discovery that are reasonably drawn. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 548 (1985) ("Guidelines"). The Board's discovery rules permit "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). These rules grant Complainants broad discovery rights, which follow the policies reflected in the Federal Rules of Civil Procedure. E.g., Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub No. 1), slip op. at 68-69 ("Our discovery rules follow generally those in the Federal Rules of Civil Procedure") (served Sept. 5, 2007).

A motion to compel discovery must state, with particularity, the nature and substance of the charges that the petitioner seeks to prove, as well as the basis for the petitioner's belief in those charges. Guidelines at 548. In addition, "the discovery requested must be reasonably

tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information.” Id. The motion should set forth adequate procedures to protect the confidentiality of the information sought. Id.

**B. This Motion Seeks Only the Production of “Non-SSI” Data.**

Here, the only objection posed by NS is the alleged “SSI” status of the requested data. But only a portion of the data is potentially “SSI” even under NS’s expanded definition. That is data regarding the routes of TIH commodities. The remainder of the traffic data clearly is not SSI and NS has not contended otherwise. In essence, the SSI “tail” is wagging the traffic data “dog.” There is no reason why this should be so.

In this Motion, DuPont asks the Board to order NS to only produce the non-SSI data by redacting the routing information for shipments of TIH commodities from the traffic data files. Since the routes of TIH commodities are the only allegedly SSI data, there is no reason for NS to withhold the entire traffic files. This will allow DuPont to proceed with the development of its SAC evidence based upon the non-SSI data and to use alternative sources for the SSI portions.

DuPont also asks the Board to order the case to proceed without the SSI data and to prohibit the parties from using the withheld SSI data in this proceeding, even if the FRA subsequently issues the long-awaited order to permit its discovery. This second request is an essential corollary to the first request because, once DuPont starts down the road of developing SAC evidence without the SSI data, it would be highly prejudicial to require DuPont to redo its SAC evidence based upon the SSI data if that data is made available at a later date. Gaining access to the SSI data after that point would require DuPont to review and reevaluate the fundamental decisions that form the framework of the SARR. This will just compound the delay to, and increase the cost of, this proceeding. Not only will DuPont incur the cost of reevaluating

its SARR, but the delay will impose huge opportunity costs attributable to the substantial capital tied up in the unreasonable rates that DuPont continues to pay to NS.

The Board's rules and precedent permit this second request in order to prevent prejudice to DuPont. Under 49 C.F.R. § 1114.31(b)(2)(ii), the Board can prohibit a party from entering into evidence any item that it refused to produce after the Board has compelled production in discovery. Further, under Board precedent, the Board has prohibited a party that did not make an item available in response to a discovery request from later entering that item into evidence where doing so would substantially delay the case to allow the other party to respond.<sup>6</sup>

Absent the SSI data, the parties will develop TIH routing information from alternative sources, as the next best evidence. This is consistent with the ultimate goal of the SAC process—"a proper evaluation of whether the rate being charged is reasonable"<sup>7</sup>—because the parties will still be able to develop a record of realistic, "feasible and supported" evidence,<sup>8</sup> and the Board will still be able to conduct a realistic and supported analysis.<sup>9</sup> Multiple approaches exist for developing realistic and feasible TIH route data. For instance, TIH routes could be imputed from the routing of non-TIH traffic; PCMiller or RailBatch pro could be used to identify TIH routing; or the waybill information that DuPont receives for its TIH shipments could be used. While these approaches will not result in perfect substitutes for actual TIH routing data, they will give rise to realistic, feasible, and supported evidence.

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<sup>6</sup> *Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989, slip op. at 7-8 (served Nov. 24, 1997) ("*Potomac*"). See also *W. Fuels Ass'n v. BNSF Ry.*, STB Docket No. 42088, slip op. at 36 (served Sept. 10, 2007) (refusing to allow BNSF to base evidence on invoices that were requested during discovery but BNSF did not produce).

<sup>7</sup> *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003)

<sup>8</sup> *Id.* at 100-01 (stating that evidence must be feasible and supported).

<sup>9</sup> *Id.* at 101 (identifying that shippers, railroads, and the public have an interest "in having rail rate regulation founded on an analysis that is realistic and supported. . . .")

The need to proceed without the SSI data is clear. Congress has expressed its desire for rate proceedings to be conducted expeditiously.<sup>10</sup> DuPont cannot develop its SARR without complete traffic data and this issue already has delayed this case by at least three months. Furthermore, there is no indication whether or when the FRA might permit discovery of the SSI data. Thus, there is no reason why this proceeding should be stalled indefinitely waiting to find out if the FRA will allow the use of alleged SSI data when there are alternatives available to the parties that can allow this proceeding to move forward now.

**C. This Motion Does Not Impose an Undue Burden Upon NS or Require a Special Study.**

Redacting SSI data from NS's traffic tapes will not constitute an undue burden. To determine if an undue burden exists, the Board applies a balancing test, weighing the burden of production against the value of the discovery.<sup>11</sup> Under this test, "discovery may [] be denied if it would be unduly burdensome in relation to the likely value of the information sought."<sup>12</sup> The burden of redacting SSI data is slight compared to the absolutely essential nature of the non-SSI data to the development of DuPont's SAC evidence, which is a fact that NS does not dispute.<sup>13</sup>

Redacting TIH data involves a negligible burden. NS clearly has the ability to identify which of its shipments are TIH, and NS clearly has the ability to identify which of the data fields in its traffic data are SSI. It should therefore be a straightforward exercise to redact the SSI from the traffic data. Further, once NS identifies the data fields that are SSI, it can redact the data electronically, without needing to manually review each record of data.

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<sup>10</sup> 49 U.S.C. § 10704(d); *Potomac*, STB Docket No. 41989, slip op. at 7 n.10 (served Nov. 24, 1997).

<sup>11</sup> *Waterloo Ry.*, STB Docket No. AB-124 (Sub-No. 2), slip op. at 3 (served May 6, 2003).

<sup>12</sup> *Id.*

<sup>13</sup> Even NS recognizes the significant value of traffic data. In a letter to the Board on this matter, NS stated that "it recognizes how important detailed car event data is to a SAC case, and [] its sole objection to production of that data is that it contains SSI that may not be disclosed except to authorized persons. . . ." Ex. A at 5.

NS may also claim that it cannot redact the TIH commodity routes from its traffic data without a special study. However, producing redacted TIH information would not require a special study. Under the Board's rules, parties are required "to furnish information in their possession, not conduct special studies."<sup>15</sup> Thus, a special study requires a party to gather information that is not in its possession or recreate information that was not kept in the ordinary course of business.<sup>16</sup>

DuPont's request for TIH information does not require NS to gather information that NS does not already possess or recreate information. The information that DuPont is requesting is in NS's possession and is information that is regularly produced in a SAC case. Surely the need for redaction does not elevate the nature of DuPont's request to a special study—redaction is a common task during discovery that does not require compiling additional information.

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<sup>15</sup> *PPL Mont., LLC v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42054, slip op. at 3 (served Nov. 9, 2000).

<sup>16</sup> *See Canadian Nat'l Ry.—Control—EJ&E W. Co.*, STB Fin. Docket No. 35087 (served Sept. 11, 2008) (holding that CN did not have to create a new document based on information that CN did not normally maintain in the ordinary course of business); *Entergy Ark., Inc. v. Union Pac. R.R.*, STB Docket No. 42104, slip op. at 6 (served May 19, 2008) ("UP does not have to conduct special studies or attempt to recreate information that was not kept in the ordinary course of business."). *But see Seminole Elec. Coop. v. CSX Transp. Inc.*, STB Docket 42110, slip op. at 2 (served Feb. 17, 2009) (holding that requiring a party to compile data and information from an affiliate did not constitute a special study). In *Seminole*, CSXT argued that discovery requests seek special studies when they require a party to "design new searches across multiple databases to create custom reports." *CSX Transp., Inc. Reply*, STB Docket No. 42110, at 14, Feb. 2, 2009. The Board, however, did not find such requests problematic, holding that the information should still be readily accessible and, therefore, "a special study is unlikely to be required." *Seminole*, STB Docket 42110, slip op. at 2 (served Feb. 17, 2009).



### III. CONCLUSION

For the foregoing reasons, DuPont respectfully requests that the Board:

- (1) order NS to respond to DuPont's RFPs 20, 21, and 22 by producing its traffic data without the alleged SSI information; and
- (2) prohibit the use of the redacted SSI data as evidence in this proceeding by either party.

Respectfully submitted,



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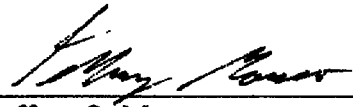
Jeffrey O. Moreno  
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## CERTIFICATE OF SERVICE

I hereby certify that I have caused this "Second Motion to Compel" to be served by hand,

this 22nd day of July 2011, on:

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Paul A. Hemmersbaugh  
Sidley Austin LLP  
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\_\_\_\_\_  
Jeffrey O. Moreno

## **Exhibit A**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

<div style="text-align: center;">E.I. DUPONT DE NEMOURS AND COMPANY</div> <div style="text-align: center;">Complainant</div> <div style="text-align: center;">v.</div> <div style="text-align: center;">NORFOLK SOUTHERN RAILWAY COMPANY</div> <div style="text-align: center;">Defendant</div>	Docket No. NOR 42125
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**DEFENDANT'S RESPONSES AND OBJECTIONS TO  
COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Norfolk Southern Railway Company ("NS"), through undersigned counsel, responds as follows to Complainant E.I. DuPont de Nemours and Company's ("DuPont's") First Set of Discovery Requests (the "Discovery Requests").

**GENERAL OBJECTIONS**

NS's General Objections, as set forth herein, are to be considered objections to each of the specific interrogatories and document requests (including subparts) that follow. NS's objections shall not waive or prejudice any objections that it may later assert.

1. NS objects to the gargantuan number and immense scope of DuPont's discovery requests, which are vastly overbroad, unduly burdensome, and grossly unreasonable. DuPont has posed 841 separate discovery requests including subparts. This broad and extensive discovery is far more oppressive and extensive than necessary for DuPont to develop evidence in this case. Indeed, DuPont's discovery requests are peppered with demands for materials that have little or no conceivable relevance to the subject matter of this case – such as demanding that NS produce "working copies" of seventeen different computer models. DuPont's failure to limit

- f. Density information (i) for segments that NS utilizes via trackage rights (a joint facility or other joint use agreement) on another railroad and (ii) for segments where other railroads operate by trackage rights (a joint facility or other joint use agreement) over NS segments and (iii) an identification of such densities in (i) and (ii) that are included in the total densities provided in response to subpart e. above.

**Response:**

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. Subject to and without waiving this specific objection or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

**REQUEST FOR PRODUCTION NO. 20**

Please produce the data bases, data warehouses and computer programs (with all documentation related to these data bases and computer programs), in a computer-readable format, that include the information listed below for each movement handled by NS as originating, terminating, overhead or single-line carrier that traveled in any of the SARR States for each year or partial year 2008 to the present:

- a. Commodity (seven-digit Standard Transportation Commodity Code "STCC");
- b. Origin station and state;
- c. Destination station and state;
- d. The name of the customer, consignee, payee and shipper for each shipment record;
- e. For shipments that originated on NS' system, the date and time the shipment was originated;
- f. For shipments NS received in interchange, the on-junction station, state and SPLC;
- g. For shipments NS received in interchange, the road received from;
- h. For shipments NS received in interchange, the date and time the shipment was interchanged;
- i. For shipments given in interchange, off-junction station, state and SPLC;
- j. For shipments given in interchange, the road to which they were given;
- k. For shipments given in interchange, the date and time the shipment was interchanged;
- l. For shipments terminated on NS' system, the date and time the shipment was terminated;

- m. Origin Freight Station Accounting Code ("FSAC");
- n. Destination FSAC;
- o. Origin SPLC;
- p. Destination SPLC;
- q. Number of railcars;
- r. Number of intermodal containers/trailers
- s. Tons (Net);
- t. Railcar tare weight;
- u. Intermodal container/trailer tare weight;
- v. Total freight revenues from origin to destination, including any adjustments thereto, along with a description of the adjustment (i.e., add to or subtract from gross revenue);
- w. NS' share or division of the total freight revenues, including any adjustments thereto;
- x. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NS' division thereof provided in response to Subparts (v) and (w) above;
- y. The contract, agreement, tariff, pricing authority, etc. that the shipment is billed under, including the amendment and item numbers;
- z. Waybill number and date;
- aa. TOFC/COFC plan;
- bb. Car/trailer/container initial for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer initials);
- cc. Car/trailer/container number for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer number);
- dd. The train identification number of all trains used to move the shipment;
- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. The total gross trailing tons, by train identification, by line segment, for all trains used to move the shipment;
- hh. The station, state and SPLC where the traffic was interchanged between trains;
- ii. Total loaded movement miles;
- jj. The predominant route of movement for each shipment on NS' system that is associated with the loaded movement miles;
- kk. Total empty movement miles;
- ll. Miles used to derive applicable fuel surcharges;
- mm. Applicable fuel surcharge rate;
- nn. Total loaded miles on NS' system;
- oo. Total empty miles on NS' system;
- pp. AAR car-type code;

- qq. Provider of car and trailer/container (NS-owned, NS-leased, shipper, or foreign road);
- rr. Provide the intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Provide the length, width and height for each car/container/trailer used to move the shipment; and
- tt. Provide the number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

**Response:**

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS also specifically objects to the requests in subparts v and x, ii, and kk as irrelevant and unduly burdensome to the extent they seek non-NS information. NS further objects to this Request to the extent it seeks information about the “nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to [NS] for transportation,” 49 U.S.C. § 11904, on the grounds that disclosure of such information to a third person (*i.e.* a person other than the shipper or consignee to whom that information pertains) is generally unlawful. The Protective Order recently issued by the Board expressly provides for the production of such information (designated “Highly Confidential”), however, finding that production of that information is essential to the disposition of this case and providing that production of such information in this case “will not be deemed a violation of 49 U.S.C. § 11904.” *See* Decision at 5, ¶ 7, *E.I DuPont de Nemours & Co v. Norfolk Southern Ry. Co.*, STB Docket No. 42125 (served Jan. 11, 2011) (Procedural Schedule and Protective Order). Accordingly, subject to NS’s other objections, NS will search for and produce responsive information whose production would otherwise be prohibited by Section 11904, to the extent it is in NS’s possession. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection

responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

#### REQUEST FOR PRODUCTION NO. 21

Please produce documents, in a computer readable format to the extent available, which contain complete information (including all events) tracking and describing car, locomotive and train movements for each car, locomotive, and train moving on NS lines to, from, or through the SARR States for each year or partial year 2008 to the present. Provide location information by station, state and SPLC.

#### **Response:**

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to this Request because it is overbroad and unduly burdensome, calling for the production of millions of records. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

#### REQUEST FOR PRODUCTION NO. 22

Please provide copies of the NS train dispatcher sheets (and the data recorded in such sheets in a computer readable format, to the extent available), or other documents (e.g., conductor wheel reports) that record train movement data in a computer readable format to the extent available, for all car and train movements and yard and hub operations on NS to, from or through the SARR States for each year or partial year 2008 to the present.

#### **Response:**

NS objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing data and documents in a manner different from how those data and documents are kept in the ordinary course of business. NS further objects to this Request because it is overbroad and unduly burdensome, to the extent it calls for NS to produce data that is not readily accessible in a computer readable format. NS also objects to the undefined term "hub



operations,” which is vague and ambiguous. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

**REQUEST FOR PRODUCTION NO. 23**

Please provide all documents, including programs, decoders, and instructions, necessary to utilize, evaluate and link the data produced in response to Request for Production Nos. 20, 21, and 22. Please include with this production a description of the relationship between the databases (e.g., whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of the records in one file to another file). Please also indicate which data fields are common (and may be used to link) to the provided databases.

**Response:**

NS objects to this Request to the extent that it requires NS to share “programs, decoders, and instructions,” which may violate the terms of applicable software licenses and agreements. NS further objects to this Request to the extent that it requires NS to perform a special study by compiling or organizing “decoders” or devising means to “link” data. NS also objects to this Request because it is overbroad and unduly burdensome. Subject to and without waiving these specific objections or the General Objections, NS responds that it will produce or make available for inspection responsive documents in its possession, to the extent that they exist and can be located in a reasonable search.

**REQUEST FOR PRODUCTION NO. 24**

Please produce all studies, analyses, reports, or other documents that evaluate or report on any NS internal company program for improving operating performance of the railroad and driving greater network efficiencies.

**Response:**

NS specifically objects to this Request because it is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The question in this proceeding is

Respectfully submitted,

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*Counsel to Norfolk Southern Railway Company*

Dated: January 19, 2011

## **Exhibit B**



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FOUNDED 1866

March 9, 2011

**By Hand Delivery**

Rachel D. Campbell  
Director  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Re: *E.I. Du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42125;  
*South Mississippi Elec. Power Association v. Norfolk Southern Ry. Co.*, STB Dkt No. 42128

Dear Director Campbell:

We represent Defendant Norfolk Southern Railway Company ("NS") in the above-referenced rail rate cases. NS thanks the Board for promptly convening the Board-supervised discovery conference that we requested, to address concerns about certain discovery requests propounded by complainants in the two pending rate cases. We reiterate that NS shares with complainants a desire to resolve expeditiously the conflict between the requirements of rail rate case discovery, on one hand, and transportation security requirements concerning sensitive security information ("SSI"), on the other. As we emphasized at yesterday's conference, NS does not wish to impede relevant discovery or the progress of these rate cases. At the same time, however, NS is obliged to adhere to other federal agencies' rules, regulations, requirements and direction concerning the manner and conditions under which information that may be SSI may be provided to other persons.

Pursuant to our agreement yesterday, NS submits this letter summarizing its SSI-related concerns and requests that the Board: (1) consult with the Federal Railroad Administration ("FRA"), the Transportation Security Administration ("TSA") and other agencies with jurisdiction over SSI, concerning the issues and obligations discussed in this letter; and then (2) issue a ruling (in coordination with the other cognizant agencies) concerning whether and under what conditions such information may be produced in discovery and used as evidence in these rate cases. NS believes it is in the best interests of the Board and its stakeholders to work with these other agencies to harmonize any conflicting rules or requirements, and to resolve issues related to the production and use of SSI in STB proceedings now.

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We start with some brief background information on SSI, governing regulations, and restrictions on the disclosure of SSI. The letter then describes and discusses the three primary categories of SSI at issue in these rate cases, which we also discussed at yesterday's joint discovery conference.<sup>1</sup>

## **I. Sensitive Security Information**

Sensitive Security Information ("SSI") is "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Secretary of DOT has determined would . . . [b]e detrimental to the security of transportation." 49 C.F.R. § 15.5(a); *see* 49 C.F.R. § 1520.5<sup>2</sup>; *see also* 49 U.S.C. §§ 114, 40119. Section 15.5(a) designates several categories of information as SSI, including "[v]ulnerability assessments," "rail transportation security measures," and information on critical rail infrastructure assets. 49 C.F.R. § 15.5(b)(5, 8, 12); *see* 49 C.F.R. § 1520.5(b) (listing 16 categories of SSI, including those listed in Section 15.5(b)). SSI may be disclosed only to "covered persons" with a "need to know." *See* 49 C.F.R. §§ 15.7, 15.11, 1520.9, 1520.11. Federal courts have recognized that SSI is privileged and protected against litigation discovery. *See, e.g., Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 615 (N.D. Cal. 2004).

In addition to posing a threat to transportation security, unauthorized disclosure of SSI exposes the person or entity who releases such information to fines and penalties, as well as enforcement and corrective actions by TSA, FRA, and other cognizant agencies. *See, e.g.*, 49 C.F.R. §§ 15.17, 1520.17. To NS's knowledge, the Board does not have explicit statutory or

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<sup>1</sup> This letter is intended as a general description of important issues and concerns regarding SSI in these cases, to aid in the expeditious resolution of those issues. NS reserves the right to submit full legal briefs and arguments on matters discussed in this letter or any related issues or questions, should it become necessary.

<sup>2</sup> The U.S. Department of Transportation regulations concerning SSI are primarily set forth in Part 15 of Title 49 of the Code of Federal Regulations. As a DOT agency, the Federal Railroad Administration applies and implements Part 15 with respect to rail carriers. A parallel set of regulations, set forth in Part 1520 of Title 49, is applied and administered by the Transportation Security Administration of the U.S. Department of Homeland Security. Those TSA security regulations, which apply to "all modes of transportation" (including rail carriers) largely parallel the DOT/FRA regulations set forth in Part 15. Because Part 1520 is administered by a different agency (and a different Department), it is possible that the cognizant agencies' interpretations and applications of Parts 15 and 1520 may differ in some instances. This is one reason that NS requests that the Board consult both FRA and TSA to determine their views and positions concerning the production of SSI in these cases.

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regulatory authority to designate information as SSI (or to remove an SSI designation), to declare that certain individuals or entities have a “need to know” SSI, or to otherwise authorize the release of SSI. Moreover, the Protective Orders issued by the Board to govern these cases do not address discovery of SSI.

Given the potential for conflicting obligations with respect to the disclosure and use of SSI in connection with a rate case, and the significant competing interests at stake, NS hereby requests that – after consultation with FRA and TSA (the primary agencies charged with review and protection of SSI) – the Board issue a ruling concerning whether and under what conditions NS should produce relevant SSI requested by complainants for use in these rate cases. As we have advised counsel for complainants and Board staff, NS believes that both prudence and compliance with federal security regulations dictate that, before NS produces information it believes to be SSI in these rate cases, it must obtain clear, coordinated authorization and direction from the responsible federal agencies charged with review and protection of transportation SSI. The necessary rulings include, at a minimum: (i) Confirmation that the information at issue constitutes SSI; (ii) Whether and under what conditions such SSI may be released to complainants, their counsel or consultants; and (iii) Whether, to what extent, and under what conditions such SSI may be included or incorporated in evidence filed with the Board in the referenced maximum rate reasonableness cases.<sup>3</sup>

## **II. Three Primary Categories of Discovery Requests Seeking SSI**

Although a number of the myriad, extensive discovery requests served in these cases could potentially encompass at least some SSI, three primary categories of discovery requests are the focus of NS’s present concern regarding the production of SSI. Those categories are: TIH traffic and event records; hazardous materials security and routing plans, protocols and information developed by NS at the direction of FRA and the Pipeline and Hazardous Materials

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<sup>3</sup> Given the sensitivity of SSI, NS would expect that any SSI released in this case would be designated “Highly Confidential” under the Board’s Protective Order, which effectively would limit its use and dissemination to outside counsel and consultants for the parties who are working on the rate cases (and have signed the relevant confidentiality undertaking), as well as the Board and its staff who analyze and review the evidence filed by the parties. Thus, at most, any SSI released in this case would be limited to persons authorized to review Highly Confidential information. NS further suggests that any SSI filed as evidence in the rate cases, or otherwise submitted to the STB, should be exempt from public disclosure or production under the Freedom of Information Act.

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Administration ("PHMSA"); and NS's Positive Train Control Implementation Plan. Below, we discuss each of those categories.<sup>4</sup>

### **TIH Traffic Event Records**

Both Complainants have requested that NS produce very detailed traffic records relating to movements handled by NS in SARR States. *See, e.g.*, DuPont Requests for Production ("RFP") 20-22; SMEPA RFP 6-8. The responsive traffic records that NS is preparing to produce include recent train and car event records that detail how each freight car handled by NS traveled through the NS system, including information revealing the routing of each car and the date and time of each "event" relating to that car (such as origin, destination, intermediate stations, interchange locations, switches, and yard activity). The system-wide car event data will include traffic records for all commodities -- including Toxic By Inhalation and Poisonous By Inhalation commodities, explosive commodities, and radioactive material (for convenience, collectively referred to below as "TIH commodities").<sup>5</sup> This routing data will be very current, including records for movements through the end of 2010. As a result, the traffic event files will show where NS routes TIH commodities and the stations, yards, rail lines, and trains that typically handle those highly dangerous commodities. As we discussed at the discovery conference yesterday, NS acknowledges that traffic data (including car event records) are essential to a SAC case, and NS is ready and willing to produce such traffic data. Before NS can do so, however, it requires an authoritative determination that production of such information will not violate obligations imposed by agencies charged with the protection of SSI.

The FRA has determined that TIH traffic routing information is SSI. For example, in SSI Order 2005-09-FRA-01, the FRA Administrator ruled that all railroad traffic information submitted to it regarding TIH commodities qualified as SSI. *See Designation of Sensitive Security Information Under 49 U.S.C. § 40119(b)*, SSI Order 2005-09-FRA-01 (Sept. 27, 2005) (hereafter, "FRA SSI Order") (copy attached as Exhibit 1). As the FRA SSI Order explained, the agency periodically requests that rail carriers provide TIH traffic information, and such information would be "of particular use and interest to a terrorist," particularly to the extent it included "details concerning the quantities and types of products[;] shippers and receivers of the commodities[;] and the times and routes of the movements." *Id.* at 2-3. Pursuant to that finding,

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<sup>4</sup> For the Board's reference, copies of complainants' primary discovery requests encompassing TIH traffic event records, hazardous materials routing analyses submitted to federal agencies, and PTC implementation plans, excerpted from Complainants' discovery requests, are attached to this letter. *See* Exhibit 2 (DuPont request excerpts); Exhibit 3 (SMEPA request excerpts).

<sup>5</sup> DOT agencies sometimes refer to TIH commodities, Divisions 1.1, 1.2, and 1.3 explosives and Class 7 highway controlled radioactive material collectively as "Sensitive Security Materials."

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FRA designated as SSI all traffic information submitted to FRA relating to TIH commodities (as defined in 49 C.F.R. § 171.8). *See id.* at 4.<sup>6</sup>

By its terms, the FRA SSI Order does not specifically apply to TIH traffic information in a railroad's possession that has not been submitted to FRA. However, based upon previous consultations with FRA staff (conducted for purposes of developing internal policies and guidelines for complying with SSI regulations), NS has determined that its internal TIH traffic information that is otherwise within the scope of the FRA description is SSI, regardless of whether that information has been provided to FRA. Accordingly, in its normal course of business, NS treats its own internal TIH traffic information in accordance with the requirements and limitations prescribed by SSI regulations.

NS reiterates that it recognizes how important detailed car event data is to a SAC case, and that its sole objection to production of that data is that it contains SSI that may not be disclosed except to authorized persons (who themselves must comply with restrictions on the use and distribution of SSI). NS is prepared to begin production of such traffic data once it is properly authorized to do so, and receives adequate assurances that such production (and use of this information as rate case evidence) will not violate its obligations under governing SSI law, rules, and regulations.

**Hazardous Materials Routing Studies and Analyses Prepared for FRA**

Complainant DuPont has asked for "any documents, reports, analyses, or studies provided to any Federal or state agencies which discuss or describe NS' compliance with regulations for handling, routing or proposed routing of hazardous materials." *See* DuPont RFP 70; *see also* DuPont RFP 151 (posing same request for NS affiliates TCS and TDIS). This request appears to be directed at the annual "[r]ail transportation route analysis" NS performs pursuant to Section 1551 of the 9/11 Commission Act (Pub L. No. 110-53) (codified at 6 U.S.C. § 1201) and 49 C.F.R. § 172.820. Section 172.820 requires rail carriers transporting certain hazardous materials to prepare an annual "[r]ail transportation route analysis" of safety and security risks on corridors in which such materials are handled and to use that routing analysis to select the route for moving covered materials. *See* 49 C.F.R. § 172.820 at (c) & (e). When promulgating this regulation, PHMSA made clear that "[t]he route selection documentation and underlying data will qualify as sensitive security information (SSI), will be handled in accordance with the SSI regulations at 49 C.F.R. Parts 15 and 1520, and may distributed only to 'covered persons' with a 'need to know.'" *Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, 73 Fed. Reg. 72182,

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<sup>6</sup> TIH traffic data is thus information designated as SSI pursuant to 49 C.F.R. § 15.5(b)(16).



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72187 (2008).<sup>7</sup> As the FRA summarized in a companion Rule issued the same day (responding to requests that SSI be released to interested third parties, such as shippers):

Because the railroad carriers' commodity data, route analyses, and conference record will contain sensitive information with a distribution limited by statute and regulation, it cannot be made available for review or comment to outside parties. To allow the detailed railroad routing information to be released to parties beyond authorized government officials and the railroad itself would defeat the purpose of the 9/11 Commission Act, and the PHMSA Final Rule: To make railroad transportation of security sensitive hazardous materials safer and more secure.

*Railroad Safety Enforcement Procedures; Enforcement, Appeal, and Hearing Procedures for Rail Routing Decisions*, FRA Final Rule, 73 Fed. Reg. 72914, 72917 (Nov. 26, 2008) (emphasis added). This clear FRA statement, and its reasoning and purpose, would also appear to apply with equal force to the disclosure of similarly detailed routing information maintained by rail carriers.

There is no question that DuPont RFP 70 calls for production of SSI. As SSI, that information cannot be produced to DuPont's counsel or consultants without an authoritative determination that they are "covered persons" who have a "need to know" within the meaning of governing regulations.<sup>8</sup>

#### **Positive Train Control Implementation**

The rate case complainants have posed several requests related to Positive Train Control implementation that call for production of SSI. For example, DuPont requested "an unredacted and fully executed copy of NS' Positive Train Control Implementation Plan filed with the Federal Railroad Administration as required by 49 C.F.R. § 236.1009(a) and § 236.1011." DuPont RFP 144; see SMEPA RFP 74. Several portions of NS's Positive Train Control Implementation Plan ("PTCIP") were redacted on the grounds that they contain "security sensitive information within the meaning of 49 C.F.R. Section 15.5." Lisa Wilson Transmittal

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<sup>7</sup> See also 49 C.F.R. § 172.820(e) (requiring rail carriers to "restrict the distribution, disclosure, and availability of information contained in the route analysis to covered persons with a need-to-know, as described in parts 15 and 1520 of this title").

<sup>8</sup> Complainant SMEPA has not requested information concerning NS' hazardous materials security and routing plans.

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Letter for version 1.3 of NS PTCIP, at 1, Docket FRA – 2010-0060 (filed July 9, 2010). The redacted SSI information includes sections discussing risk factors, risk analysis, and risk prioritization. *Id.* Complainants' requests for an "unredacted" version of the PTCIP thus directly implicate SSI. In addition, it is possible that some of the information in NS's possession responsive to complainants' requests for "all studies, analyses, detailed plans and estimates developing NS' estimated costs to design, install and maintain the Positive Train Control system" described in the PTCIP will also constitute SSI. *See* DuPont RFP 145.

**Other Requests That Potentially Implicate SSI**

The three most significant types of discovery requests propounded in these cases that call for production of SSI are detailed above. However, a number of complainants' other discovery requests may implicate some SSI. For example, several DuPont requests directly ask for information on NS's security procedures. *See, e.g.*, DuPont Interrogatories 7(i), 13(f), 15(d), and 17(f); DuPont RFP 110. While NS will make an effort to respond to these requests without revealing SSI, it is possible that some responsive information will implicate SSI. *See* 49 C.F.R. § 15.5 (1, 8, 10, 13) (SSI includes "security programs and contingency plans," "security measures," "security training materials," and "systems security information"). Similarly, a number of DuPont discovery requests call for information on handling of hazardous materials. *See, e.g.*, DuPont Interrogatory 7(c); DuPont RFPs 99, 100, 153, 154. And, a few additional SMEPA requests may implicate SSI. *See, e.g.*, SMEPA Interrogatory 10(c), RFP 26.

NS is presently in the process of gathering and reviewing information potentially responsive to these requests, and it will promptly advise complainants if it identifies otherwise relevant and responsive information that contains SSI.<sup>9</sup> While NS believes that it likely will be able to respond to most of these requests without revealing SSI, it is possible that some information in NS's possession responsive to these requests may include SSI.

\* \* \* \*

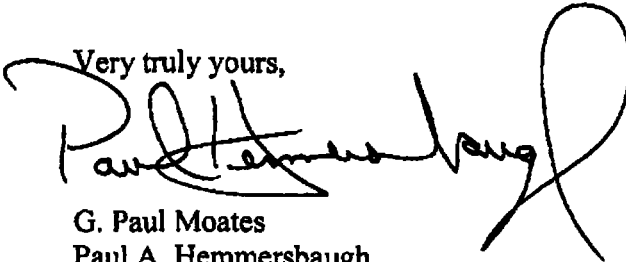
We hope that the foregoing summary of the DuPont and SMEPA discovery requests that implicate SSI is helpful to the Board, and we appreciate the Board's willingness to work with

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<sup>9</sup> Because traffic data is important to the development and submission of SAC evidence, NS decided to bring this specific SSI (along with requests for routing and security plans and unredacted PTC implementation plans) question to the attention of the Board and the parties immediately, so it could be resolved expeditiously and without unduly impeding the progress of the rate cases. The other requested information that could potentially contain SSI, which NS is presently reviewing, is less likely to be central to a SAC analysis.

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FRA and TSA to resolve these issues. If you have questions, please contact the undersigned.

Very truly yours,  
  
G. Paul Moates  
Paul A. Hemmersbaugh

cc: Jeffrey Moreno  
Kelvin Dowd  
Craig Keats  
William Brennan  
Valerie Quinn

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.



Issued by the Department of Transportation  
On September 27, 2005

Designation of

**SENSITIVE SECURITY INFORMATION**

under 49 U.S.C. 40119(b)

**ORDER**

**Summary.** By this Order, the Department of Transportation (DOT) designates certain information as Sensitive Security Information (SSI) under 49 U.S.C. 40119(b), as implemented by 49 CFR Part 15. The information is therefore subject to restrictions on its release, maintenance, and dissemination, as specified in 49 CFR Part 15.

**Background.** For many years, DOT's Federal Aviation Administration (FAA) had statutory authority to prevent disclosure of information related to aviation security, termed "SSI." In the leading case of *Public Citizen v. Federal Aviation Administration*, 300 U.S. App. D.C. 238; 988 F.2d 186 (DC Cir. 1993), the court set forth three aspects of this authority:

1. The statute under which FAA restricted disclosure of this information – 49 U.S.C. App. 1357 (1993) -- qualified under Exemption 3 of the Freedom of Information Act (FOIA) as a "statute (A) [that] requires that the matters be withheld from the public in such a way as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." (5 U.S.C. 552(b)(3).) Hence, SSI may be withheld from public disclosure under FOIA.

2. The information may be withheld from the public rulemaking record in an informal rulemaking under 5 U.S.C. 553.

3. The information may be withheld from discovery in civil litigation.

In response to the attacks upon the United States of 9/11/01, Congress enacted the Aviation and Transportation Security Act (Public Law 107-71, 115 Stat. 597 (2001)), which created in DOT a new Transportation Security Administration (TSA), with authority for security in all modes of transportation. 49 U.S.C. 114. That statute also transferred from the FAA to the TSA the authority to designate information as SSI and expanded the

scope of that authority to all modes of transportation. 49 U.S.C. 114(s).<sup>1</sup> When Congress created the Department of Homeland Security (DHS) in the Homeland Security Act of 2002, (Pub. L. 107-295, 116 Stat. 2064 (2002)), it transferred TSA and its SSI authority from DOT to DHS, and gave similar authority to DOT, again as to all modes of transportation. See 49 U.S.C. 40119(b).<sup>2</sup>

Both 49 U.S.C. 114(s) and 49 U.S.C. 40119(b) require that an agency administering SSI authority promulgate regulations specifying the types of information qualifying for SSI treatment. DOT's appear at 49 CFR Part 15, and DHS's appear at 49 CFR Part 1520, both entitled "Protection of Sensitive Security Information".<sup>3</sup> Parts 15 and 1520 set forth categories of information that qualify as SSI and authorize officials of DOT and DHS to determine that specific items of information come within any of those categories. The authority vested in the Secretary of Transportation by 49 U.S.C. 40119(b) and implemented in 49 CFR Part 15 has been delegated to the Administrator of each DOT agency. See 49 CFR 1.45(a)(19).

**Discussion.** Railroads carry over 1.7 million shipments of hazardous materials annually. Some of the most hazardous materials carried by rail are materials that are poisonous by inhalation, commonly referred to as toxic inhalation hazard (TIH) materials. Roughly 10 million tons of TIH chemicals are shipped by rail each year in more than 20,000 dedicated rail cars. DOT's Federal Railroad Administration (FRA) is responsible for promulgating and enforcing general railroad safety regulations that contribute to the safe rail transportation of TIH materials. In addition, FRA assists the DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) in developing and enforcing safety and security rules regarding the movement of TIH and other hazardous materials. In carrying out its various railroad safety and security roles FRA periodically requests railroad traffic information from offerors and carriers of TIH materials. This information can include details concerning the quantities and types of products, shippers and receivers of the

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1. 49 U.S.C. 114(s) Nondisclosure of security activities.

(1) In general. Notwithstanding section 552 of title 5, the [Administrator of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of [title 49, US Code] if the [Administrator of TSA] decides that disclosing the information would--

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the security of transportation.

2. 49 U.S.C. 40119. Security and research and development activities.

\* \* \* \*

b) Disclosure.

(1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would --

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to transportation safety.

3. 69 FR 28066; May 18, 2004.

commodities, and the times and routes of the movements, information that is of particular use and interest to a terrorist.

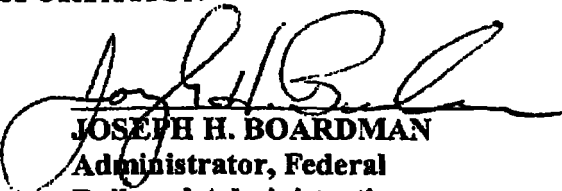
I conclude that the TIH traffic information that FRA gathers meets the requirements for SSI designation under 49 U.S.C. 40119(b) and is not currently protected as such under 49 CFR Part 15.

**ACCORDINGLY,**

1. The information identified in the Appendix to this Order is designated Sensitive Security Information, irrespective of the medium in which that information may appear; and
2. The information is subject to 49 CFR Part 15, as it may be amended from time to time.

**FOR THE SECRETARY OF TRANSPORTATION**

**By:**

  
**JOSEPH H. BOARDMAN**  
Administrator, Federal  
Railroad Administration

**(SEAL)**

## **APPENDIX TO SSI ORDER 2005-09-FRA-01**

The following information has been designated as SSI, irrespective of the medium in which that information appears:

1(a). Railroad traffic information regarding materials poisonous by inhalation, commonly referred to as toxic inhalation hazard (TIH) materials, that is submitted to FRA by railroad shippers and carriers in accordance with paragraph (b). Materials considered poisonous by inhalation are defined in 49 CFR 171.8, and fall into one of the following three categories:

- i. A gas meeting the defining criteria in 49 CFR 173.115(c), and assigned to Hazard Zone A, B, C, or D in accordance with 49 CFR 173.116(a);
- ii. A liquid (other than as a mist) meeting the defining criteria in 49 CFR 173.132(a)(1)(iii), and assigned to Hazard Zone A or B in accordance with 49 CFR 173.133(a); or
- iii. Any material identified as an inhalation hazard by a special provision in column 7 of the table in 49 CFR 172.101.

(b) In order for the traffic information identified in paragraph (a) to be considered as SSI, the information must:

- i. have been submitted to FRA pursuant to a specific written request by the FRA Associate Administrator for Safety stating that the traffic information is being requested pursuant SSI Order 2005-09-FRA-01; and
- ii. the submitter must submit the information under a cover sheet stating that the enclosed material is Sensitive Security Information submitted pursuant to an FRA request made under the authority of SSI Order 2005-09-FRA-01.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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E.I. DUPONT DE NEMOURS AND COMPANY	)	
	)	
Complainant,	)	
	)	
	)	
v.	)	Docket No. NOR 42125
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
	)	
Defendant.	)	

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COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS  
TO DEFENDANT

Complainant E.I. DuPont De Nemours and Company ("DuPont"), pursuant to 49 U.S.C. §§ 10701, 10704, 10707, 11701 and 11704, and 49 C.F.R. Part 1114.30, hereby submits its First Set of Discovery Requests to Defendant, Norfolk Southern Railway Company ("NS").

Responses to "Complainant's First Set of Discovery Requests" should be delivered to the offices of Thompson Hine LLP, 1920 N Street, N.W., Washington, D.C. 20036, January 14, 2011, unless otherwise agreed by the parties. DuPont is prepared to cooperate with NS to facilitate the expeditious production of documents with the minimum practical burden.



required to use the data. The density database or spreadsheet should include, at a minimum, the following data:

- a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
- b. Station name and SPLC at the beginning of a unique density segment and at the end of a unique density segment;
- c. Beginning and ending milepost for each unique density segment;
- d. Rail and track mileage for each unique density segment;
- e. ( i ) Total density (both directions including empty and loaded trains) by segment expressed in net ton-miles; or in the alternate, (ii) total density (both directions including empty and loaded trains) by segment expressed in gross ton-miles plus appropriate factors that can be used to convert gross ton-miles to net ton-miles on each unique density segment; and
- f. Density information (i) for segments that NS utilizes via trackage rights (a joint facility or other joint use agreement) on another railroad and (ii) for segments where other railroads operate by trackage rights (a joint facility or other joint use agreement) over NS segments and (iii) an identification of such densities in (i) and (ii) that are included in the total densities provided in response to subpart e. above.

#### REQUEST FOR PRODUCTION NO. 20

Please produce the data bases, data warehouses and computer programs (with all documentation related to these data bases and computer programs), in a computer-readable format, that include the information listed below for each movement handled by NS as originating, terminating, overhead or single-line carrier that traveled in any of the SARR States for each year or partial year 2008 to the present:

- a. Commodity (seven-digit Standard Transportation Commodity Code "STCC");
- b. Origin station and state;
- c. Destination station and state;
- d. The name of the customer, consignee, payee and shipper for each shipment record;
- e. For shipments that originated on NS' system, the date and time the shipment was originated;
- f. For shipments NS received in interchange, the on-junction station, state and SPLC;
- g. For shipments NS received in interchange, the road received from;
- h. For shipments NS received in interchange, the date and time the shipment was interchanged;
- i. For shipments given in interchange, off-junction station, state and SPLC;
- j. For shipments given in interchange, the road to which they were given;
- k. For shipments given in interchange, the date and time the shipment was interchanged;
- l. For shipments terminated on NS' system, the date and time the shipment was terminated;
- m. Origin Freight Station Accounting Code ("FSAC");
- n. Destination FSAC;
- o. Origin SPLC;
- p. Destination SPLC;

- q. Number of railcars;
- r. Number of intermodal containers/trailers
- s. Tons (Net);
- t. Railcar tare weight;
- u. Intermodal container/trailer tare weight;
- v. Total freight revenues from origin to destination, including any adjustments thereto, along with a description of the adjustment (i.e., add to or subtract from gross revenue);
- w. NS' share or division of the total freight revenues, including any adjustments thereto;
- x. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NS' division thereof provided in response to Subparts (v) and (w) above;
- y. The contract, agreement, tariff, pricing authority, etc. that the shipment is billed under, including the amendment and item numbers;
- z. Waybill number and date;
- aa. TOFC/COFC plan;
- bb. Car/trailer/container initial for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer initials);
- cc. Car/trailer/container number for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer number);
- dd. The train identification number of all trains used to move the shipment;

- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. The total gross trailing tons, by train identification, by line segment, for all trains used to move the shipment;
- hh. The station, state and SPLC where the traffic was interchanged between trains;
- ii. Total loaded movement miles;
- jj. The predominant route of movement for each shipment on NS' system that is associated with the loaded movement miles;
- kk. Total empty movement miles;
- ll. Miles used to derive applicable fuel surcharges;
- mm. Applicable fuel surcharge rate;
- nn. Total loaded miles on NS' system;
- oo. Total empty miles on NS' system;
- pp. AAR car-type code;
- qq. Provider of car and trailer/container (NS-owned, NS-leased, shipper, or foreign road);
- rr. Provide the intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Provide the length, width and height for each car/container/trailer used to move the shipment; and
- tt. Provide the number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

REQUEST FOR PRODUCTION NO. 21

Please produce documents, in a computer readable format to the extent available, which contain complete information (including all events) tracking and describing car, locomotive and train movements for each car, locomotive, and train moving on NS lines to, from, or through the SARR States for each year or partial year 2008 to the present. Provide location information by station, state and SPLC.

REQUEST FOR PRODUCTION NO. 22

Please provide copies of the NS train dispatcher sheets (and the data recorded in such sheets in a computer readable format, to the extent available), or other documents (e.g., conductor wheel reports) that record train movement data in a computer readable format to the extent available, for all car and train movements and yard and hub operations on NS to, from or through the SARR States for each year or partial year 2008 to the present.

REQUEST FOR PRODUCTION NO. 23

Please provide all documents, including programs, decoders, and instructions, necessary to utilize, evaluate and link the data produced in response to Request for Production Nos. 20, 21, and 22. Please include with this production a description of the relationship between the databases (e.g., whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of the records in one file to another file). Please

REQUEST FOR PRODUCTION NO. 70

Please produce copies of any documents, reports, analyses or studies provided to any Federal or state agencies which discuss or describe NS' compliance with regulations for handling, routing or proposed routing of hazardous materials.

REQUEST FOR PRODUCTION NO. 71

Please produce a copy of NS' rules pertaining to train handling, including but not limited to measures for conserving fuel.

REQUEST FOR PRODUCTION NO. 72

Please produce documents, in a computer-readable format to the extent available, which describe (a) how NS determines the dispatch priority given to each train type (*e.g.*, doublestack, priority intermodal, through, general freight, unit coal, *etc.*); and (b) NS' methodology for scheduling all trains by train type.

REQUEST FOR PRODUCTION NO. 73

Please produce all agreements between NS and CSXT or their affiliates, and any amendments thereto, implementing the grant to NS of equal access to the MGA coal region in connection with the Conrail control transaction approved by STB in Finance Docket No. 33388 (Decision No. 89, Ordering Paragraph 26), including, but not limited to, agreements governing NS' and CSXT's operations on the MGA lines and any payments made between NS and CSXT related to capital improvements, maintenance expenses and/or operating expenses on the MGA lines.

REQUEST FOR PRODUCTION NO. 144

Please produce an unredacted and fully executed copy of NS' Positive Train Control Implementation Plan filed with the Federal Railroad Administration as required by 49 CFR §236.1009(a) and §236.1011.

REQUEST FOR PRODUCTION NO. 145

Please provide all studies, analyses, detailed plans and estimates developing NS' estimated costs to design, install and maintain the Positive Train Control system detailed in NS' Positive Train Control Implementation Plan filed with the Federal Railroad Administration on April 16, 2010.

REQUEST FOR PRODUCTION NO. 146

Please provide documents related to the amount of Bonus Depreciation claimed by NS Corp separately for 2008 and 2009 on NS Corp's Federal Tax Returns in Schedule 4562. The amount should be separated by asset class and include the historical cost recorded for the assets related to the claimed bonus depreciation, including all schedules and worksheets showing the calculation and development of bonus depreciation allowed under the Economic Stimulus Act of 2008 and the American Reinvestment and Recovery Act.

REQUEST FOR PRODUCTION NO. 147

Please provide the following NS Geographic/Geospatial Information System ("GIS") data. The GIS data should be viewable, readable, and writable with no access

connection with engineering studies, authorization for expenditures, marketing studies, operating expense budgets, capital budgets, or mergers with or acquisitions of other carriers.

**REQUEST FOR PRODUCTION NO. 151**

Please produce copies of any documents, reports, analyses, or studies provided to any Federal or state agencies which discuss or describe TCS' and/or TDIS' compliance with regulations for handling, routing, or proposed routing of hazardous materials.

**REQUEST FOR PRODUCTION NO. 152**

Please produce all TCS and/or TDIS railcar maintenance agreements with outside contractors, including all supplements, attachments, exhibits, and schedules, for each year or partial year 2006 to the present, for all TCS and/or TDIS cars moving on NS' system. Also provide the documents identifying (a) the dollar amount paid for each service performed under the agreement by individual car or by car type; and (b) the number of car-miles corresponding to the amounts referenced in Request for Production No. 152, subpart a.

**REQUEST FOR PRODUCTION NO. 153**

Please provide information related to any liability expense incurred as a result of TCS' and/or TDIS' handling hazardous materials for each year or partial year 2007 to the present. For each liability expense incurred, please provide the following:



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

<b>SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 42128</b>
	)	
<b>NORFOLK SOUTHERN RAILWAY COMPANY</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**COMPLAINANT'S FIRST REQUESTS  
FOR ADMISSIONS, INTERROGATORIES,  
AND REQUESTS FOR PRODUCTION OF  
DOCUMENTS TO DEFENDANT  
NORFOLK SOUTHERN RAILWAY COMPANY**

Complainant South Mississippi Electric Power Association ("SMEPA"), pursuant to 49 C.F.R. Part 1114.30, hereby submits its First Requests for Admissions, Interrogatories, and Requests for Production of Documents to Defendant Norfolk Southern Railway Company ("NS").

Responses to SMEPA's Requests for Admissions, answers to Interrogatories, and copies of documents responsive to SMEPA's Requests for Production should be delivered to the offices of Slover & Loftus LLP, 1224 Seventeenth Street, N.W., Washington, D.C. 20036, within thirty (30) days from the date hereof,

Request for Production No. 6

Please produce the data bases, data warehouses and computer programs (with all documentation related to these data bases and computer programs and associated selection criteria), in a computer-readable format, that include the information listed below for each movement handled by NS as originating, terminating, overhead or single-line carrier that traveled in the SARR States for each year or partial year 2010 to the present:

- a. Consignee, shipper, payee, and/or customer;
- b. Commodity (seven-digit Standard Transportation Commodity Code "STCC");
- c. Origin city and state;
- d. Destination city and state;
- e. For shipments that originated on NS's system(s), the date and time the shipment was originated;
- f. For shipments NS received in interchange, the on junction location station number and Standard Point Location Code ("SPLC");
- g. For shipments NS received in interchange, the road received from;
- h. For shipments NS received in interchange, the date and time the shipment was interchanged;
- i. For shipments given in interchange, off junction location and station number;
- j. For shipments given in interchange, the road given to;
- k. For shipments given in interchange, the date and time the shipment was interchanged;

- l. For shipments terminated on NS's system, the date and time the shipment was terminated;
- m. Origin Freight Station Accounting Code ("FSAC");
- n. Destination FSAC;
- o. Origin SPLC;
- p. Destination SPLC;
- q. NS Interchange Location(s) FSAC(s);
- r. NS Interchange Location(s) SPLC(s);
- s. Number of rail cars;
- t. Tons (Net);
- u. Rail car tare weight;
- v. Total freight revenues from origin to destination, or NS's share of the total freight revenues in the event NS is not the sole carrier for a particular movement, including any adjustments thereto, along with a description of the adjustment (*i.e.*, add to or subtract from gross revenue);
- w. Total revenues from surcharges (including but not limited to fuel surcharges), and whether such revenue from surcharges is included in the total freight revenues and NS's division thereof provided in response to Subpart (v) above;
- x. The contract, agreement, tariff, or other pricing authority that the shipment is billed under;
- y. Waybill number and date;
- z. TOFC/COFC plan;
- aa. Car/trailer/container initial for each car/trailer/container used to move the shipment;

- bb. Car/trailer/container number for each car/trailer/container used to move the shipment;
- cc. If a trailer or container is used to move the shipment, the car initial and number used to move the trailer or container;
- dd. The train identification number of all trains used to move the shipment;
- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. Total loaded movement miles;
- hh. Total loaded miles on NS's system;
- ii. AAR car-type code;
- jj. Provider of car (NS-owned, NS-leased, shipper or foreign road);
- kk. Number of intermodal containers/trailers;
- ll. Intermodal container/trailer tare weight;
- mm. Total empty movement miles;
- nn. Miles used to derive applicable fuel surcharges;
- oo. Applicable fuel surcharge rate;
- pp. Total empty miles on NS's system;
- qq. AAR car-type code;
- rr. Intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Length, width and height for each car/container/trailer used to move the shipment; and

- tt. Number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

Request for Production No. 7

Please produce documents, in a computer-readable format to the extent available, which contain complete information (including all events) tracking and describing car, trailer/container, and locomotive movements (including yard and hub operations) from origin to destination for each car, trailer/container, and locomotive moving in the SARR States for each year or partial year 2008 to the present. Provide location information by station, state, SPLC, and milepost to the extent available.

Request for Production No. 8

Please provide documents that record complete train movement data (including all events and intermediate stations) in a computer readable format to the extent available, from origin to destination for all NS train movements (including yard and hub operations) to, from, within or through the SARR States for each year or partial year 2008 to the present. Provide location information by station, state, SPLC, and milepost to the extent available.

Request for Production No. 9

Please provide all documents, including programs, decoders, and instructions, necessary to utilize, evaluate and link the data produced in response to Request for Production No. 6, Request for Production No. 7, and Request for Production No. 8. Please include with this production a description of the relationship between the databases (*e.g.*, whether there is a 1:1 ratio between databases, or whether one can expect

**Request for Production No. 71**

Please produce documents showing the ad valorem taxes that NS paid to each of the SARR States for each year or partial year 2008 to the present, together with documents showing the total route-miles and total track-miles NS owned or owns in the state for each year 2008 to the present.

**Request for Production No. 72**

Please produce documents sufficient to show the following information for each intermodal facility located in the SARR States:

- a. The annual costs to operate each facility separated by function; and
- b. The annual throughput of each facility (e.g., automobiles, containers, trailers, carloads, etc.).

**Request for Production No. 73**

Please produce all documents relating to any contribution by any governmental or quasi-governmental entity (including, without limitation, AMTRAK) to construction, upgrading, maintenance and/or operating expenses on any NS lines in the SARR States.

**Request for Production No. 74**

Please produce an unredacted copy of NS's Positive Train Control ("PTC") Implementation Plan filed with the Federal Railroad Administration as required under 49 C.F.R. Part 236, as well as any amendments or supplements thereto.

Request for Production No. 75

Please produce documents sufficient to show NS's actual or expected costs (including costs for design, installation and maintenance) to implement its PTC program, as described in NS's PTC Implementation Plan, in any of the SARR States. If no such documents exist, please produce documents sufficient to show NS's actual or expected cost per route mile and/or track mile to implement its PTC Implementation Plan on a system-wide basis.

Request for Production No. 76

Please produce copies of the most current land valuation maps for the SARR States, and all documents (including but not limited to deeds or other instruments of grant or conveyance) related to the parcels identified on those maps.

Request for Production No. 77

Please produce documents sufficient to show all donated rights of way and/or land grants (including easements) obtained by NS and/or NS's predecessors in connection with the construction of any rail lines or facilities located in the SARR States.

Request for Production No. 78

Please produce all documents related to any sale, appraisal, abandonment or acquisition of land (improved and unimproved) that NS completed in the SARR States since 2008, including but not limited to documents showing the location of the parcel, size of the parcel, the valuation of the parcel by NS, the sale or acquisition price, a description of any improvements to the parcel, the date of sale, and any characteristics of the parcel such as land use, utilities, access and topography.

## **Exhibit C**



March 10, 2011

*Via Hand Delivery*

Rachel D. Campbell  
Director  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423

**RE: Docket No. NOR 42125, E.I. du Pont de Nemours and Company v.  
Norfolk Southern Railway Company**

Dear Director Campbell:

As counsel for E.I. du Pont de Nemours and Company ("DuPont") in the above-referenced proceeding, I am writing in response to the March 9, 2011, letter from Norfolk Southern Railway Company ("NS"). While DuPont appreciates the Board's willingness to address the issues raised by NS in a prompt and expeditious manner, it remains troubled by the broad and unprecedented nature of NS's request. NS has objected to multiple discovery requests posed by DuPont to the extent that such requests encompass sensitive security information ("SSI"). This has posed potentially difficult issues for the discovery of information that is essential to a complainant's ability to challenge the reasonableness of rail rates before the Board. DuPont does not object a process by which the Board will consult with the Federal Railroad Administration ("FRA") and Transportation Security Administration ("TSA") to determine whether the discovery requested by DuPont is SSI, and if so, to establish conditions pursuant to which DuPont may obtain essential discovery, but only if such process is deemed to be necessary and does not cause undue delay to this proceeding that would be prejudicial to DuPont.

DuPont is concerned with the highly subjective designation of certain information as SSI that no other railroad has objected to producing in other rate cases and that, even by NS's own admission, does not fall squarely within any regulatory definition of SSI. NS Letter, p. 5. Moreover, even if the information is SSI, it is not at all clear why it would not be adequately protected by a "Highly Confidential" designation under the protective order in this proceeding. If necessary, the protective order could be modified to explicitly reference SSI.

The lack of specificity in the NS letter also is troubling. This is the first time that a railroad has designated its entire traffic event files as SSI. Although NS has generally identified routing information as SSI, it does not state with specificity which portions of its vast traffic event files contain this SSI. This detail should be known to both DuPont and the Board before seeking the opinion of FRA and TSA. Not only will these details make for a more informed and narrowly

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March 10, 2011

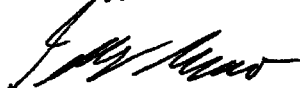
Page 2

tailored SSI designation, it also may allow the parties and the Board to devise alternative ways to present evidence without SSI.

DuPont agrees that the proper designation of SSI, and terms for its use in rate cases, is an important issue that needs to be resolved not just for this case, but for future rate cases. DuPont further believes that the Board has all the authority that it needs to order CSXT to produce the information requested. However, DuPont also recognizes that an extended discovery dispute before the Board, and potentially other agencies and the courts is likely to result in a prolonged delay of this proceeding. Therefore, to the extent this issue can be addressed successfully and expeditiously by consultation of the Board with FRA and TSA, DuPont would welcome the Board's efforts.

But, DuPont asks that the Board not to allow this process to turn into a quagmire of additional proceedings before other agencies during which this rate case is left in a holding pattern. If a prompt resolution cannot be obtained, DuPont reserves all of its rights and remedies under the applicable statutes and regulations. Moreover, DuPont requests that the Board remain open to exercising its full authority to compel production of information that is essential to a rate case, and also to alternatives for the presentation of stand-alone cost evidence without the SSI at issue.

Sincerely,



Jeffrey O. Moreno

*Counsel for E.I. du Pont de Nemours and Company*

Cc: Paul Hemmersbaugh  
Kelvin Dowd  
Craig Keats  
William Brennan  
Valerie Quinn